from suing for delay,[4] there is considerable authority to the contrary, on the ground that he has waived his right.[5]

If by "waiver" these courts mean a gratuitous renunciation of a cause of action, once accrued, the cases cannot be supported, for such waiver is really a release, and to be binding must be founded on consideration;[6] though waiver of a defence need not be.[7] The term "waiver" is, however, used loosely in the cases, and it would be unfair to infer that courts always mean to allow a gratuitous release of a cause of action, for it is often possible to find consideration. The seller, after having broken his promise, is not bound to make a subsequent tender, so that such tender, being a legal detriment, may constitute the consideration for an accord. By this use of the term "waiver," then, courts may be taken to mean a contract to waive or, more accurately, an accord and satisfaction. Viewed in this way, the question becomes mainly one of fact, whether the parties actually made this new agreement. It should be clear that, when the buyer explicitly states that the subsequent tender is not taken as satisfaction, no new agreement can be found.[8] On the other hand, it should be equally clear that when the seller states or his conduct implies that the tender is an offer to an accord, the acceptance completes an accord and satisfaction which precludes the buyer from claiming damages for defective performance. The main conflict in the decisions is when neither party has said anything. In such a case it is difficult to find mutual assent to the new agreement. It seems more natural to suppose that the seller's late tender is an attempt to carry out the original contract to the best of his ability. His action, therefore, amounts to a waiver on his part of his right not to be compelled to make a late tender, which, as it is not a release of a cause of action, obviously requires no consideration. All doubts should be construed in favor of the buyer, since the seller alone has been at fault. Whenever, accordingly, tender and acceptance are made without explanation on either side, it may well be ruled, as a matter of law, that there is no evidence upon which a jury could find that the seller had satisfied the burden of proving an accord and satisfaction.

RECENT CASES.

ADMIRALTY — TORTS — LIABILITY OF SHIP FOR WILFUL TORT OF SEAMAN. — One of the crew of a steam-tug, acting outside the scope of his employment, wilfully blew off steam and hot water from the boiler so as to deluge the side of another tug. *Held*, that the former vessel is liable for the damage done. *The Bulley*, 138 Fed. Rep. 170 (Dist. Ct., S. D., N. Y.).

At common law, a master is liable only for those wilful acts of his servants which are done within the scope of their employment. *Mott* v. *Consumers' Ice Co.*, 73 N. Y. 543. And in admiralty by the English rule, it is doubtful whether the vessel can be proceeded against where the owner would not be personally

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[4] Redlands Orange Growers' Ass'n *v.* Gorman, 161 Mo. 203. See Garfield & Proctor Coal Co. *v.* Fitchburg R. R. Co., 166 Mass. 119.

[5] Roby *v.* Reynolds, 72 N. Y. 487; Minneapolis Threshing Machine Co. *v.* Hutchins, 65 Minn. 89.

[6] See Anson, Contracts, 10th ed., 334; 18 HARV. L. REV. 365.

[7] Sigourney *v.* Wetherell, 6 Met. (Mass.) 553; Uhler *v.* Farmers' National Bank, 64 Pa. St. 406

[8] Jones *v.* National Printing Co., 13 Daly (N. Y.) 92.

liable. *The Druid*, 1 Wm. Rob. 391, 399; see also CARVER, CARRIAGE BY SEA, 4th ed., § 707. In America, however, the vessel is liable regardless of the personal responsibility of the owner, on the theory that the vessel itself is the wrongdoer. *United States* v. *Brig Malek Adhel*, 2 How. (U. S.) 210, 233; *The China*, 7 Wall. (U. S.) 53, 68. But if the vessel itself is not the instrument in the wrongdoing, there seems no ground for holding it liable as the offender; and in such a case, therefore, our courts would probably follow an English decision that where the crew of one vessel cut the cable of another alongside, the former vessel was not liable. *Currie* v. *M'Knight*, [1897] A. C. 97. Whether the vessel is the instrument may often be difficult to determine; and perhaps no more definite test can be laid down than that it may be so regarded, whenever the vessel itself or any integral part thereof is employed in the wrongdoing. Here the vessel seems clearly the instrument, so that the general American doctrine applies.

AGENCY — CREATION OF AGENCY — WHETHER SPECIAL POLICE OFFICER IS AGENT OF EMPLOYER. — The charter of New York City provided that the police board might, on application, appoint special patrolmen to be paid by the applicant, but to be subject to the orders of the chief of police, and to "possess all the powers and discharge all the duties of the police force, applicable to regular patrolmen." A special patrolman, appointed under this provision on the application of the defendant, arrested the plaintiff. *Held*, that, in an action for false imprisonment, the defendant is not liable for the arrest, as he did not specifically request it. *Samuel* v. *Wanamaker*, 107 N. Y. App. Div. 433.

This question arises on statutes usually falling into one of two classes. The first class, for instance, makes the conductors or station agents of railroads, by virtue of their positions as employees, conservators of the peace, with power and duty to arrest disorderly persons on trains or in stations. The second class is typified by the statute in the present case. In the former class it seems that the employee is not actually made an officer of the state, but rather that the powers of the railroad are increased to better enable it to perform its duties as a common carrier. The railroad, therefore, is held liable for the misuse of this authority. *King* v. *Illinois Central Rd. Co.*, 69 Miss. 245. But in the principal case it is clear that the special patrolman was an officer of the state, acting as a member of the police force, and that the defendant would have no power to restrain him from performing his duty. *Cf. Sharp* v. *Erie Rd. Co.*, 90 N. Y. App. Div. 502. That he was paid by the defendant is not material. *Woodhull* v. *Mayor, etc., of Brooklyn*, 150 N. Y. 450. The patrolman could not be the servant of the defendant while performing acts as an officer of the state. *Railway Co.* v. *Hackett*, 58 Ark. 381.

ATTACHMENT — OF REALTY — EFFECT. — The plaintiff, having brought an action in a federal court, attached certain realty of the defendant. Later, a receiver under state insolvency proceedings against the defendant took possession of the property, and instituted proceedings in the state court to enjoin the federal marshal from interfering therewith. The plaintiff moved the federal court to enjoin the action of the receiver. *Held*, that the motion must be denied. *Ingraham* v. *National Salt Co.*, 139 Fed. Rep. 684 (Circ. Ct., E. D., N. Y.).

It is generally recognized that comity forbids interference by one court of concurrent jurisdiction with property in the "possession" of another. *Buck* v. *Colbath*, 3 Wall. (U. S.) 334. The case under consideration turns on the question whether such "possession" is obtained by the attachment of realty. The court holds that it is not; and this result is supported by another circuit court decision. *Re Hall & Stilson Co.*, 73 Fed. Rep. 527. But it is as squarely opposed by a holding and a strong *dictum* in circuit courts of appeal. *Gates* v. *Bucki*, 53 Fed. Rep. 961; *Southern, etc., Co.* v. *Folsom*, 75 Fed. Rep. 929. Though the federal authorities are divided there are several state *dicta* to the effect that there is no possession in a court by virtue of the attachment of realty. *Scott* v. *Manchester Print Works*, 44 N. H. 507. It is true that in the case of personalty attached and corporeally taken into the possession of an

officer, an attempt by another court to take custody of the same goods would precipitate an unseemly physical struggle. Yet no such result need follow in the case of realty where actual possession is never taken on attachment. Therefore the policy of the rule of non-interference does not apply.

ATTORNEYS — COMPENSATION AND LIEN — LIEN ON FUND RECOVERED FOR PERSON OTHER THAN CLIENT. — Minority stockholders of a corporation brought action against certain directors, with whom the corporation was joined as defendant, to recover dividends wrongfully paid. After commencement of the action, but before trial, the defendant directors repaid to the corporation the full amount claimed. *Held*, that the plaintiffs' attorneys are not entitled to have their claim for compensation declared a lien thereon. *Matter of Meighan*, 106 N. Y. App. Div. 599.

The New York Code of Civil Procedure, § 66, gives an attorney a lien upon his client's cause of action that cannot be affected by any settlement between the parties before judgment. But here the attorneys were not retained by the corporation; and the general rule is that an attorney must look to his client alone for his fee, not to other persons who may be benefited by the action. *Scott* v. *Dailey*, 89 Ind. 477. It is true that the minority stockholders merely set the judicial machinery in motion, and that in effect the action is that of the corporation. POM. EQ. JUR., 3d ed., § 1095. And doubtless they should be given the right of reimbursement for reasonable attorney's fees from the fund recovered in an action which the corporation should have brought. *Meeker* v. *Winthrop Iron Co.*, 17 Fed. Rep. 48; and see *Trustees* v. *Greenough*, 105 U. S. 527. But the attorneys should look to their clients for remuneration, and not be given a direct lien on this fund. If the minority stockholders had agreed that their attorneys should have one-quarter of the judgment recovered, no one would maintain that the attorneys would have a lien for this amount against the fund paid to the corporation. There is, however, direct authority against this decision. *Grant* v. *Lookout Mountain Co.*, 93 Tenn. 691; *Central Rd., etc., of Georgia* v. *Pettus*, 113 U. S. 116, 124.

ATTORNEYS — COMPENSATION AND LIEN — PRIORITY OVER RIGHT OF SET-OFF. — The defendant had obtained a judgment against the plaintiff for costs. In the same cause of action, though upon an independent appeal in a different court, the plaintiff secured a judgment against the defendant upon which her attorney claimed a lien for disbursements. The defendant's motion to set off his judgment against the plaintiff's judgment was denied. The defendant appealed. *Held*, that the attorney's lien has priority over the right of set-off. *Smith* v. *Cayuga Lake Cement Co.*, 107 N. Y. App. Div. 524.

The conflict in England on this question between the courts of Common Pleas and the King's Bench was finally settled after the Judicature Acts of 1873 in favor of the equitable rule that the attorney's lien is subject to a set-off. See JONES, LAW OF LIENS, 2d ed., § 215. There is a singular conflict in this country. If the client has assigned the judgment to his attorney before an attempt at set off has been made, the attorney's right will defeat the set-off. *Ripley* v. *Bull*, 19 Conn. 53; *contra*, *Fitzhugh* v. *McKinney*, 43 Fed. Rep. 461. But if no such assignment has been made, the courts are about evenly divided as to whether the lien is prior. The New York court has already allowed the lien to prevail when the judgments were rendered in separate actions although between the same parties. This court now applies the rule where the judgments are rendered in the same action. The attorney's lien is a derivative claim depending upon the interest of his client in the judgment. If this interest in the hands of the client is subject to an existing right of set-off, logically it is difficult to see how the attorney has a greater right. *Cf. National Bank of Winterset* v. *Eyre*, 8 Fed. Rep. 733.

BANKRUPTCY — PREFERENCES — GIVING POSSESSION UNDER A PRIOR BILL OF SALE. — More than four months before bankruptcy, A gave B a bill of sale of her stock in trade as security for a loan, but the bill of sale was not

recorded, nor did B take possession. Within four months of bankruptcy proceedings, A gave B possession of the goods under the bill of sale, being at that time, as B had reasonable ground to believe, insolvent. *Held*, that the transaction does not constitute a preference. *Christ* v. *Zehner*, 61 Atl. Rep. 822 (Pa.).

For a discussion of the principles involved, see 18 HARV. L. REV. 606.

BANKRUPTCY — PREFERENCES — SECURED CREDITORS. — A contract for a sewer, let in September, 1903, by a municipal corporation, provided for withholding ten per cent of the monthly payments, and gave the corporation's engineer authority to order direct payment by the city to firms supplying machinery to the contractor, if there was reasonable cause to believe he was unduly delaying payment. In October, 1904, the contractor was adjudicated bankrupt on his own petition. The engineer thereafter directed payment to a machinery firm. *Held*, that the power conferred on the engineer is not annulled by the contractor's bankruptcy, and the trustee in bankruptcy cannot prevent payment by the city. *In re Wilkinson*, [1905] 2 K. B. 713.

The English Bankruptcy Act makes voidable payments or transfers of property by the bankrupt during three months prior to bankruptcy proceedings, if a preference was intended. 46 & 47 Vict. c. 52, § 48. Had the contract in the present case been made during the statutory period, it could have been avoided by the trustee, if the intent to prefer existed. Or if the consideration for the contract had been given by the bankrupt within the three months, there would also have been a preference except in jurisdictions where a transfer is valid if contracted for before the statutory period. See *Marvin* v. *Bushnell*, 36 Conn. 353. But in the present case, before this period began, the bankrupt had performed his part of the contract, and sufficient funds had been retained by the corporation from which to make payment. One creditor got a priority after bankruptcy, but it was not caused by an act of the bankrupt done within the statutory period by himself or through an agent. He transferred his property before the time when the trustee can set his transactions aside on the ground of preference. There was no fraud, for sufficient consideration was received.

BILLS AND NOTES — CHECKS — RIGHT OF SET-OFF BY DRAWER OF DISHONORED CERTIFIED CHECK. — The drawer of a check had it certified before delivery to the payee. Before it was presented, the bank stopped payment and the check was dishonored. The drawer recovered the check from the payee upon paying its face value. *Held*, that the payee is the bank's creditor at the time of insolvency, and the drawer, who becomes a creditor afterwards, cannot set off the amount of the check against his indebtedness to the bank. One justice dissented. *Schlesinger* v. *Kurzrok*, 94 N. Y. Supp. 442.

A bank, by certifying a check, puts itself in the position of the acceptor of a bill of exchange and becomes primarily liable to the holder. *Merchants' Bank* v. *State Bank*, 10 Wall. (U. S.) 604; N. Y. Neg. Inst. Law, § 323. But the position of the court is not sound in considering the drawer in the present case as a mere outsider acquiring a claim against the bank after its insolvency. The drawer of a check who has it certified before delivery to the payee, is still liable to the holder. *Minot* v. *Russ*, 156 Mass. 458. He is not liable on the original debt, however, for the payee surrenders his direct claim against the drawer for a direct claim against the bank and a secondary claim against the drawer. The cases show that the drawer's liability is the same as that of the drawer of a bill of exchange. He is surety for the acceptor and liable only after the acceptor defaults. A surety can set off his payments made in behalf of the principal against his indebtedness to the principal, even though such payments are made after the latter's insolvency. *Cosgrove* v. *McKasy*, 65 Minn. 426. The minority opinion, therefore, seems to be correct.

BILLS AND NOTES — DEFENSES — NOTICE TO INDORSER. — The holder of a promissory note, excused under the Negotiable Instruments Law from presentment for payment because of the death of the maker and the non-appointment of a personal representative, brought an action against the indorser. *Held*,

that the holder is not also excused from giving notice of dishonor to the indorser. *Reed* v. *Spear*, 107 N. Y. App. Div. 144.

At common law when no place of payment was specified, before the indorser could be charged, presentment had to be made to the personal representative of a deceased maker, or if none had been appointed, at the maker's house. *Price* v. *Young*, 1 Nott & M. (S. C.) 438. In no case did the death of the maker dispense with the necessity for notice of dishonor to the indorser. *Oriental Bank* v. *Blake*, 22 Pick. (Mass.) 206. By the Negotiable Instruments Law, adopted in New York, presentment otherwise than to the deceased maker's personal representative is excused. L. 1897, c. 612, §§ 136, 142. But when presentment is thus excused the instrument is regarded as dishonored by non-payment just as though payment had been refused. *Ibid.* § 143. So although there is no express provision covering this point, yet as the common law rule that notice of dishonor must be given the indorser is embodied in the Negotiable Instruments Law, §§ 160, 186, with certain exceptions not applicable here, the present decision is undoubtedly a sound construction of that law.

BILLS OF PEACE — BILL BY ASSIGNEE OF A CORPORATION FOR UNPAID STOCK SUBSCRIPTIONS. — *Held*, that the assignee of an insolvent corporation may join its stockholders in a single bill in equity to recover the unpaid balances of their stock subscriptions, although no accounting is necessary since it will require all unpaid subscriptions to pay the debts. *Cook* v. *Carpenter*, *Appeal of Lipper*, 61 Atl. Rep. 799 (Pa.).

Although it is commonly said that equity will take jurisdiction to prevent a multiplicity of suits, the cases are not harmonious as to the precise limits of the doctrine. Most authorities require that there must appear at least a question common to all the actions. *Hale* v. *Allinson*, 188 U. S. 56. And such seems to be the law in Pennsylvania. *Young's Appeal*, 3 Penny. (Pa.) 463; *Proprietors' School Fund* v. *Heermans*, 1 Kulp (Pa.) 469; but *cf. Cumberland Valley Rd. Co.'s Appeal*, 62 Pa. 218. Nor is it sufficient that the separate rights arose in connection with the same general transaction. *The Lehigh Valley R. R. Co.* v. *McFarlan*, 30 N. J. Eq. 135, 31 N. J. Eq. 730. Thus, bills have been allowed by a creditor or receiver against stockholders to determine such common questions as the necessity for a call, or the amount of assessment when stockholders' liability is limited. See *Pfohl* v. *Simpson*, 74 N. Y. 137. In the rare instances in which pecuniary relief has been granted in this form of action in equity, the various claims appear to have been for liquidated amounts. See *The German, etc., Ins. Co.* v. *Van Cleave*, 191 Ill. 410. Since in the principal case the obligations are upon separate contracts and no common controversy of law or fact is disclosed, the equity of the bill must be in avoiding many suits for liquidated claims. But it seems that the legal remedies for such claims are not yet considered inadequate. *Cf. Hale* v. *Allinson*, *supra*, 102 Fed. Rep. 790, 793.

CEMETERIES — LIFE TENANT'S RIGHT TO GRANT BURIAL PERMITS. — The owner of a tract of land, on which he had conducted a private cemetery, deeded it to trustees for the use of his wife for life. *Held*, that the life tenant has the right to continue granting burial permits, which confer a permanent right to the use of the soil for the purposes of graves. *Hill* v. *Moore*, 33 Wash. L. Rep. 549 (D. C., Sup. Ct.). See NOTES, p. 205.

CHARITIES — BEQUESTS — TO UNINCORPORATED SOCIETIES. — A testator made a bequest to an unincorporated Spiritualist society "to be used by said society in such manner as it may deem most expedient for the development and advancement of spiritualism at Freeville, Tompkins County, N. Y." *Held*, that the gift fails. *Fralick* v. *Lyford*, 107 N. Y. App. Div. 543. See NOTES, p. 202.

CONSTITUTIONAL LAW — OBLIGATION OF CONTRACTS — INTERPRETATION BY SUPREME COURT. — Under a constitutional provision which invested the legislature with full power to correct abuses by public service companies, the legislature passed a law empowering municipalities to fix a maximum water

rate, with the provision that this should in no case interfere with existing contracts. The Supreme Court of Florida decided that the constitutional power conferred upon the legislature could be exercised only in its entirety and that the exception regarding existing contracts was void. *Held*, that this interpretation of the state constitution was a possible one and that the United States Supreme Court would not interfere. *The Tampa Water Works Co.* v. *The City of Tampa*, U. S. Sup. Ct., Nov. 13, 1905.

The only question before the Supreme Court was whether the interpretation which the Florida court put upon the constitutional clause in deciding that it meant that the legislature must exercise its full power, if any, was so unreasonable that it should be reversed. Ordinarily, when a legislative body is expressly invested with full power, the part which it refrains from exercising is inoperative. *M'Intire* v. *Wood*, 7 Cranch (U. S.) 504. Hence, on a fair interpretation of the constitutional clause, the conclusion of the Florida court was wrong and, as a matter of strict logic, should have been overruled. But, in view of the very numerous instances in which the Supreme Court has refused to reverse questionable decisions of state courts on the ground that such decisions represent a possible view of the contention, the Supreme Court reluctantly declined to overrule the state decision. This case, therefore, illustrates the length to which the Supreme Court will go in sustaining a decision of a state court.

CONSTITUTIONAL LAW — SEPARATION OF POWERS — DELEGATION OF LEGISLATIVE POWER. — A statute provided that fish commissioners might prohibit any discharge of sawdust into a stream if they determined that it occasioned injury to edible fish. *Held*, that this is a delegation of legislative power, but is not unconstitutional. *Commonwealth* v. *Sisson*, 33 Banker & Tradesman 2216 (Mass., Sup. Ct., Oct. 17, 1905). See NOTES, p. 203.

CONTRACTS — CONSTRUCTION — IMPLIED PROMISE TO FURNISH REASONABLE AMOUNT OF WORK. — Without notice to its employees, the defendant company shut down. The plaintiff, one of the employees thereby thrown out of work, brought suit against the company, claiming damages under his contract for piece work. *Held*, that the plaintiff can recover, since the contract of employment contained an implied promise to furnish a reasonable amount of work. *Devonald* v. *Rosser*, 93 L. T. R. 274 (Eng., K. B., June 6, 1905).

For a consideration of the principles involved, see 19 HARV. L. REV. 133.

CONTRACTS OF AFFREIGHTMENT — FREIGHT — JUSTIFIABLE ABANDONMENT OF SHIP. — The owners of a vessel contracted to carry a cargo of lumber from Pensacola to Montevideo, freight payable on delivery at the port of destination. The ship encountered heavy gales and was justifiably abandoned. The derelict was brought by salvors to Boston, where both ship-owner and cargo-owner applied for possession of the cargo, which, however, was later sold under an order of court upon allegation that it was diminishing in value. The ship-owner filed a libel for freight on the ground that he was ready and willing to go on with the contract, but had been prevented. *Held*, that he can not recover. *The Eliza Lines*, U. S. Sup. Ct., Oct. 30, 1905. See NOTES, p. 200.

CORPORATIONS — CORPORATE POWERS AND THEIR EXERCISE — POWER OF WATER COMPANY TO MORTGAGE FRANCHISE IN NATURE OF EASEMENT. — A water company, having a franchise to maintain pipes in the streets of a city to supply the city with water, mortgaged all its property and franchises. *Held*, that the franchise constitutes an easement which may be mortgaged and which cannot be taken away from the mortgagee by a decree against the company annulling the franchise, entered in a suit begun after the mortgage was given and in which the mortgagee was not joined. *Farmers' Loan & Trust Co.* v. *Meridian Waterworks Co.*, 139 Fed. Rep. 661 (Circ. Ct., S. D., Miss.).

Power to mortgage its property is, generally, an implied power of a corporation. *Aurora Agricultural Society* v. *Paddock*, 80 Ill. 263. Such power is, however, by the weight of authority, denied to corporations undertaking a

public duty, on the ground that the corporation might thereby disable itself from performing that duty. *Commonwealth* v. *Smith*, 10 Allen (Mass.) 448. By the weight of authority, also, the franchises of a corporation (other than the franchise to be a corporation, which is clearly inalienable) may not be mortgaged without legislative consent. *Carpenter* v. *Black Hawk Gold Mining Co.*, 65 N. Y. 43; *Memphis R. R. Co.* v. *Commissioners*, 112 U. S. 609. The case discussed illustrates two tendencies: first, to restrict the old rule forbidding public corporations to mortgage, such restrictions being either by statute or by the action of courts in confining the rule to corporations given the power of eminent domain or exclusive rights; and secondly, the tendency to hold franchises of this nature transferable. See *Hunt & Bro.* v. *Memphis Gaslight Co.*, 95 Tenn. 136; *New Orleans, etc., R. R. Co.* v. *Delamore*, 114 U. S. 501. The doctrine restricting the alienation of corporate property and franchises had its birth in the days when corporations were commonly created by special act and when they might truly be said to have a personal duty to the state in respect to the privileges granted to them specially. As to-day the creation of corporations by special legislation is exceptional, the reason for the old rule has passed away, and the rule itself may well be abandoned.

DEATH BY WRONGFUL ACT — STATUTORY LIABILITY — RIGHTS OF NON-RESIDENT ALIENS. — A statute authorized an administrator to maintain an action "for the benefit of the decedent's husband or wife, and next of kin," to recover for pecuniary injuries resulting to such persons from a wrongful act causing the decedent's death, against a defendant who "would have been liable to an action in favor of the decedent . . . if death had not ensued." The plaintiff sued the defendant, whose negligence caused the death of the plaintiff's intestate, in behalf of the widow and next of kin, who were non-resident aliens. *Held*, that the plaintiff can recover. *Alfson* v. *The Bush Co., Lim.*, 182 N. Y. 393.

The legislation of most states, including New York, creating liability for death by wrongful act, copies, in its principal features, the English Act of Lord Campbell. The effect of that statute is to create a new right of action, which vests in the personal representative and is not part of the decedent's estate. *Pym* v. *Great Northern Ry. Co.*, 4 B. & S. 396. The class of beneficiaries is, therefore, determined solely by the interpretation of the statute. In holding that a non-resident alien is included, the present case follows an earlier decision of a lower court. *Tanas* v. *Municipal Gas Co.*, 88 N. Y. App. Div. 251. The English authorities upon this question are in conflict. See *Adams* v. *British, etc., Steamship Co.*, [1898] 2 Q. B. D. 430; *Davidsson* v. *Hill*, [1901] 2 K. B. D. 606. Most American courts permit non-resident aliens to recover under similar statutes. *Mulhall* v. *Fallon*, 176 Mass. 266; *contra*, *Deni* v. *Pennsylvania R. Co.*, 181 Pa. 525. The language of these statutes seems to define the class of beneficiaries independently of residence or nationality. The contrary decisions rest upon a doctrine that statutes of a state are presumed, in the absence of express language, to apply only to persons within its territorial jurisdiction. See *McMillan* v. *Spider Lake, etc., Co.*, 115 Wis. 332, 337. While this rule of construction may be applicable to statutes imposing burdens, because of the inability of a state to fasten obligations upon aliens outside its territorial jurisdiction, no such reason exists for a similar interpretation of statutes conferring benefits.

DIVORCE — ALIMONY — PAYMENT AFTER DEATH OF HUSBAND. — The plaintiff was granted a divorce from her husband with alimony during her life, secured by a mortgage executed by her husband and the defendant. The plaintiff sued to recover alimony accruing since her husband's death. *Held*, that she cannot recover. *Wilson* v. *Hinman*, 182 N. Y. 408.

For an adverse criticism of the holding of the Appellate Division which is here reversed, see 18 HARV. L. REV. 541.

DOMICILE — MARRIAGE OF INFANT. — An infant whose parents were domiciled in Victoria was married in a foreign jurisdiction, where there was evidence tending to show his intent to settle. Upon divorce proceedings

instituted in Victoria it became important to determine his domicile. *Held*, that although the respondent has been married, still, as he is an infant, he is incapable of changing his domicile. *Robertson* v. *Robertson*, [1905] Vict. L. R. 546.

The court seems to lay down as an absolute rule that no infant can acquire a new domicile. It is hard to see why on principle this should be true in the case of an emancipated infant, who is entirely separated from his parents. It is clear that the settlement of an emancipated minor does not follow that of his father. *St. Michael's, Norwich* v. *St. Matthew's, Ipswich*, 2 Stra. 831; *Lowell* v. *Newport*, 66 Me. 78. On the contrary, such a minor may acquire a new settlement of his own. *Lubec* v. *Eastport*, 3 Me. 220. The statutes governing the acquisition of a settlement require a residence, which is usually construed as "domicile." *Abington* v. *North Bridgewater*, 40 Mass. 170. Therefore this would furnish authority for allowing an emancipated minor to acquire a new domicile of his own. It can hardly be said, however, that marriage alone works the emancipation of a minor. But in the ordinary case, where a minor after marrying establishes a home of his own, supporting himself, he does become emancipated. *Sherburne* v. *Hartland*, 37 Vt. 528; see also *Rex* v. *Wittoncum Twambrookes*, 3 T. R. 355. Though the point is disputed, it seems that the same would be true in the case of a minor married without his parents' consent. *Commonwealth* v. *Graham*, 157 Mass. 73. Thus the minor might by his marriage be enabled to acquire a new domicile. *Cf. Succession of Robert*, 2 Rob. (La.) 427.

EQUITY — INJUNCTION — RIPARIAN RIGHTS. — A corporation proposed to divert water from the Passaic River, at a point above the navigable portion, into New York to sell. The state of New Jersey, through the Attorney General, sought an injunction. *Held*, that the state, by virtue of owning the bed of the navigable portion of the Passaic River, is entitled, as a riparian proprietor, to an injunction to restrain the defendant from taking the water outside the state. *McCarter, Atty. Gen.* v. *Hudson Water, etc., Co.*, 61 Atl. Rep. 710 (N. J., Ch.).

The doctrine is a novel one, that the state has the rights of a "riparian proprietor" through ownership of the bed of the navigable portion of a stream. The words, "riparian rights," suggest that ownership of the bank is a necessary element. And this view is supported by the English rule that these rights do not depend on ownership of the soil under the stream. *Lyon* v. *Fishmongers Co.*, 1 App. Cas. 662. Riparian rights and restrictions, moreover, seem to have arisen from the benefit conferred by the stream upon the riparian tract. So a riparian owner may make a reasonable use of the water, such right of user being an incident to the soil, and passing therewith. *Union M. and M. Co.* v. *Ferris*, 2 Saw. (U. S. C. C.) 176. He is entitled to the natural flow, save for reasonable use by proprietors above. *Tyler* v. *Wilkinson*, 4 Mas. (U. S. C. C.) 397. But he may not assign his rights in gross. *Stockport Water Co.* v. *Potter*, 3 H. & C. 300. Nor may he use the water beyond the riparian tract. *Moulton* v. *Newburyport Water Co.*, 137 Mass. 163. In the case at hand apparently none of the usual riparian benefits are conferred upon the stream-bed; and so the reason for extending riparian rights to the owner thereof fails. The decision, however, may be supported on the ground of the state's right to object to improper interference with a navigable stream, even though such interference took place beyond the limits of the state, or above the navigable portion. *Cf. Pennsylvania* v. *Wheeling, etc., Bridge Co.*, 13 How. (U. S.) 518; *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690; *Missouri* v. *Illinois and Chicago District*, 180 U. S. 208.

FALSE IMPRISONMENT — CIVIL LIABILITY — LIABILITY OF JUDICIAL OFFICER. — The defendant, a justice of the peace, issued a warrant returnable before himself, instead of before a justice in the town where the offense was committed, as required by statute. In spite of objection, he tried and convicted the plaintiff. This conviction was afterwards reversed. *Held*, that the warrant did not confer jurisdiction over the plaintiff, and that the defendant is liable in

a civil action for false imprisonment. *McCarg* v. *Burr*, 106 N. Y. App. Div. 275.

The defendant committed two errors: first, in causing an arrest under a defective warrant, and secondly, in convicting without jurisdiction. The issuing of a warrant, void on its face, is a wrongful exercise of a ministerial, as distinguished from a judicial, function, for which a justice is civilly liable. *Blythe* v. *Tompkins*, 2 Abb. Pr. (N. Y.) 468. The sentence purported to be a judicial act, which is absolutely privileged. COOLEY, TORTS, 2d ed., 477. But the fact that a judge assumes jurisdiction does not of itself make his acts thereunder judicial. *The Case of the Marshalsea*, 10 Co. 369. The warrant being defective in substance, not merely in form, gave no jurisdiction in fact over the plaintiff. *Wills* v. *Whittier*, 45 Me. 544. The tendency, however, is to accord a presumption of jurisdiction, even to inferior courts. *Thompson* v. *Jackson*, 93 Ia. 376. In the principal case the assumption of jurisdiction did not arise from a mistaken fact, but from an error of law, on which two opinions could not honestly be entertained by reasonable men, and so the presumption of jurisdiction should not protect the defendant. *Cf. Grove* v. *Van Duyn*, 44 N. J. L. 654; see also 12 HARV. L. REV. 352; 13 *ibid.* 407. The criterion suggested for rebutting the presumption, analogous to that applied on motions to set aside verdicts, protects a judge from the consequences of every error of judgment, unless totally unreasonable, but leaves him answerable for the commission of a wrong that is practically wilful.

HUSBAND AND WIFE — RIGHTS AND LIABILITIES OF HUSBAND AS TO THIRD PARTIES — LIABILITY OF HUSBAND FOR MAINTENANCE OF INSANE WIFE IN PUBLIC ASYLUM. — The trustees of a county insane asylum petitioned for an order to compel the defendant to pay a certain sum weekly for the support of his insane wife in the asylum, to which she had been committed by the proper public authorities. *Held*, that the defendant is not liable. *Richardson* v. *Stuesser*, 103 N. W. Rep. 261 (Wis.).

The common law liability of a husband for necessary expenses incurred by his wife after she has left his bed and board rests upon an implied contract, which is raised only where her departure is ascribable to his wrongful act or default. SCHOULER, HUSBAND AND WIFE, § 111. In the present case the husband is clearly guilty of no wrong, whether he sets in motion the machinery of the law, or merely yields, perhaps reluctantly, to the action of the public authorities in confining his wife. Thus there seems to be no ground for raising the implied contract, which alone, in the absence of a statute, should make the husband liable. *Cf. County of Delaware* v. *McDonald*, 46 Iowa, 170; *contra*, *Goodale* v. *Lawrence*, 88 N. Y. 513. There is a decided conflict of authority on the question involved; but the reasoning of the principal case seems sound, as public policy, which seeks at once the protection of the insane and of the community, demands that no selfish fear of liability on the husband's part shall block the effect of the wholesome legislation which requires the commitment of the insane to a public institution. See *Baldwin* v. *Douglas County*, 37 Neb. 283.

INSURANCE — COMMENCEMENT, DURATION, AND TERMINATION OF LIABILITY — INEVITABLE LOSS WITHIN PERIOD OF RISK. — A warehouse and goods therein were insured until April 1, 1902, noon. *Held*, that even though the destruction of the warehouse by fire appeared inevitable during the time limit of the policy, the company is not liable for loss to the goods if fire did not actually start in the warehouse until after April 1, 1902, noon. *Rochester German Ins. Co.* v. *Peaslee Gaulbert Co.*, 87 S. W. Rep. 1115 (Ky., Ct. App.).

A careful search of the authorities stamps this case as one of first impression. The court clearly points out that the liability of the insurer is for actual loss, and not for damage the imminence or certainty of which existed during the term fixed in the policy. The conclusion reached harmonizes with other branches of insurance law. See 17 GREEN BAG 674. So, where one insured against death in fact survives the term of the contract, no recovery can be had, even though he was attacked with a fatal disease before the expiration of the policy. See *Howell* v. *Knickerbocker Life Ins. Co.*, 44 N. Y. 276; *Lockyer* v.

Offler, 1 T. R. 252, 260. Similarly, to allow any recovery in marine insurance the vessel must have suffered loss during the term of the policy, and the extent of such recovery is restricted to the magnitude of the loss incurred during this term, though there be a subsequent total destruction. *Howell* v. *Protection Ins. Co.*, 7 Oh. (pt. 1) 284. Accordingly, if the "death wound" so received rendered subsequent total loss inevitable, indemnity for total loss should be allowed, for the property was thereupon rendered valueless. See *Coit* v. *Smith*, 3 Johns. Cas. (N. Y.) 16; *Duncan* v. *Great Western Co.*, 5 Abb. Pr. (N. Y.) N. S. 173. The court remarks *obiter* that a similar rule of damages would have been applied if the fire making total destruction inevitable had, in fact, attacked the warehouse during the life of the policy. But if the goods were insured as a separate risk, they are as much a separate subject of insurance as two adjoining buildings under separate policies. And the very basis of this decision is that fire must have attacked the insured property itself, and that vast depreciation caused by imminent danger from fire, which has merely seized contiguous property, gave no right to damages.

JUDGMENTS — RIGHT OF ASSIGNEE TO SUE FOR BREACH OF OFFICER'S DUTY. — *Held*, that the assignment of a judgment does not pass to the assignee the judgment creditor's right of action against an officer for misconduct which occurred prior to the assignment. *Commonwealth ex rel. Vicars* v. *Wampler*, 51 S. E. Rep. 737 (Va.).

On the question here involved, the authorities are squarely in conflict. *Cf. Redmond* v. *Staton*, 116 N. C. 140; *Citizens', etc., Bank* v. *Loomis*, 100 Ia. 266. It is generally admitted that the assignment of a judgment necessarily carries with it "all the beneficial interest of the assignor in the judgment, and all its incidents." See FREEMAN, JUDGMENTS, 4th ed., § 431. But "incidents," in its accepted meaning would not include a mere collateral right of action against a public officer, since such right of action is in no legal sense a security for the debt. See *Commonwealth for Faris* v. *Fuqua*, 3 Litt. (Ky.) 41. Obviously justice requires that if the assignee of the judgment has suffered by its depreciation caused by an officer's breach of duty, he should be allowed to recover damages from the offending officer. Yet the legal claim against the officer, undoubtedly resting in the assignor prior to the assignment, can hardly have been transferred. The logical solution of the difficulty would seem to be that the assignor becomes constructive trustee of the claim for the benefit of the assignee. This being the situation, the assignee or beneficiary would in many jurisdictions be allowed to sue directly at law under the common statute providing that actions "shall be prosecuted in the name of the real party in interest."

LANDLORD AND TENANT — RENT — DISTRAINT OF CROWN PROPERTY. — A government horse used in the South African War was lent to a yeoman, and later was seized and sold under distress for the yeoman's rent. The government appealed from an adverse decision in an action for illegal distress. *Held*, that the appeal should be granted, since crown property on a subject's land cannot be distrained for rent. *Secretary of State for War* v. *Winne*, 22 T. L. R. 8 (Eng., K. B., Oct. 26, 1905).

Although no modern decisions on this point have been found, the doctrine of the case is supported by the ancient writers, and seems sound on principle. Where the crown was a tenant, the landlord was unable to distrain for rent. 9 *Vin. Abr.*, 2d ed., 125; *Brook Abr.*, pl. 46. Crown cattle damage feasant could not be distrained. *Rex* v. *Prior de Okeburne*, P. 22 E. I. If courts would not allow distress in that case, where the crown was at fault, they surely would not have allowed it in the case under discussion, where the crown was blameless. Sound principles demand the same result. The government must be absolutely unhampered in the use of its own property. For that reason, a state is not allowed to tax property belonging to the federal government. Similarly, neither federal nor state nor county property, retaining its public nature, can be levied on or sold under an execution. *Mayrhofer* v. *Board of Education*, 89 Cal. 110. For the same reason distress should not be allowed.

LIBEL AND SLANDER — PRIVILEGED COMMUNICATIONS — STATEMENTS OF INTENDED WITNESS TO ATTORNEY AND CLIENT. — The defendant made defamatory statements to an attorney and his client in the course of their preliminary interview with him as a prospective witness. *Held*, that the defendant is protected by the same privilege which would shield him as a witness on the stand. *Watson* v. *M'Ewan*, [1905] A. C. 480.

It is now well settled that the defamatory words of a witness on the stand made with reference to the matter at issue are absolutely privileged. *Dawkins* v. *Lord Rokeby*, L. R. 7 H. L. 744. In the United States, however, the qualification is generally added that the statements must be pertinent to the enquiry. *McDavitt* v. *Boyer*, 169 Ill. 475. A few judicial expressions to the effect that this privilege is confined to the case of a witness while testifying on the stand were clearly made with no thought of the present situation. See *Seaman* v. *Netherclift*, 2 C. P. D. 53, 56. The answer to the question now raised, whether the absolute privilege of witnesses on the stand should be extended to preliminary examinations by attorneys, must depend on considerations of public policy. The judgment and reasoning of the court seem well grounded. Witnesses will not submit to a preliminary examination, through which the progress of trials is so much facilitated, if they are liable for statements then made. The public benefit obtained by the protection of the intended witness seems greatly to outweigh the little harm likely to result from a defamatory communication made only to an attorney and his client. For any republication, they may, of course, be liable. ODGERS ON LIBEL AND SLANDER, 4th ed., 165.

LIFE ESTATES — RESIDUARY BEQUEST OF CHATTELS PERSONAL FOR LIFE. — A testator bequeathed the residue of his chattels personal to his wife for life. *Held*, that the wife takes a life interest only. *Walker* v. *Hill*, 60 Atl. Rep. 1017 (N. H.).

The English and American authorities agree that a gift by will of personal chattels for life, with a limitation over, conveys to the first legatee an interest for his life only. *Vachel* v. *Vachel*, 1 Ch. Cas. 129; *Smith* v. *Bell*, 6 Pet. (U. S.) 68. The case in which a chattel personal is bequeathed for life, without a limitation over, has not arisen in England; but numerous American decisions hold that under this form of bequest also the interest continues during the legatee's life only. *Black* v. *Ray*, 1 Dev. & B. (N. C.) 334; *Anonymous*, 2 Hayw. (N. C.) 161. These principles apply equally where the bequest is of a residue as distinguished from a specific chattel. *Smith* v. *Bell*, *supra*. The technical nature of this life interest is a question on which the decisions are silent. The interest cannot be a legal *estate*, because the common law recognized no tenure and hence no estates in chattels personal. See 2 POLLOCK & MAITLAND, HIST. OF ENG. LAW, 2d ed., 182; *Welsch* v. *Belleville Savings Bank*, 94 Ill. 191, 204. The American decisions holding that a reversion exists when no limitation follows the bequest, negative the possibility of regarding the first interest as absolute and the limitation over as an executory bequest. Perhaps the most accurate form of statement is that the legatee has such an interest as entitles him to the use and possession of the chattel during his life. See 14 HARV. L. REV. 407-418.

PARTNERSHIP — PARTNERSHIP PROPERTY — CONVEYANCE TO FIRM IN FIRM NAME. — A firm continued to transact business under the name of "William Wray," a deceased partner. Land was purchased with firm money for partnership purposes, the deed of conveyance running to "William Wray" as grantee. *Held*, that the legal title to the land vests in the several members of the firm as joint tenants. *Wray* v. *Wray*, [1905] 2 Ch. 349.

No other English case has been found deciding the effect of a deed of land to a partnership in the firm name. In reaching the decision the court implicitly relied upon a former case, in which the same point was raised in connection with a chattel mortgage. *Maugham* v. *Sharpe*, 17 C. B. (N. S.) 442 The American decisions in point as to realty show a well defined conflict of authority. See 10 HARV. L. REV. 188. The predominant American rule vests title only in

those partners whose names appear in the firm name. *Holmes* v. *Jarrett Moon & Co.*, 7 Heisk. (Tenn.) 506; *Gille* v. *Hunt*, 35 Minn. 357. A number of decisions, however, tend to harmonize with the rule of the English case, which clearly commends itself to reason. *Hoffman* v. *Porter*, 2 Brock. (U. S. C. C.) 156; *Byam* v. *Bickford*, 140 Mass. 31. A deed of conveyance to be valid needs only to describe the grantee with reasonable certainty. *Morse & Houghton* v. *Carpenter*, 19 Vt. 613. Where a firm name collectively represents the individual members in usual business transactions, the name of that firm as party to a deed of conveyance would seem to describe the individual partners as grantees with sufficient certainty.

PHYSICIANS AND SURGEONS — NECESSITY OF PATIENT'S CONSENT TO OPERATION. — The plaintiff consented to allow the defendant to operate on her right ear. After anesthetics had been administered, the defendant discovered that the plaintiff's left ear was in a more serious condition than was her right. Consequently he operated upon the left ear. The plaintiff sued him for damages for an assault and battery. *Held*, that she may recover, since she had not consented to the operation on the left ear. *Mohr* v. *Williams*, 104 N. W. Rep. 12 (Minn.).

For a discussion of the principles involved, see 18 HARV. L. REV. 624.

RIGHT OF SUPPORT — REMOVAL OF SUPPORT — GRANITE QUARRIES. — A grantor made a conveyance of land in fee to the defendant, reserving title to the granite of which some was exposed; and afterwards conveyed his remaining interest in the lot to the plaintiff. *Held*, that though the plaintiff has title to all the underlying granite, he must leave a reasonable support for the surface and may quarry only the granite actually exposed to view from time to time. *Phillips* v. *Collinsville Granite Co.*, 51 S. E. Rep. 666 (Ga.).

Granite is included in the legal meaning of the word "minerals." *Armstrong* v. *Granite Co.*, 147 N. Y. 495. Unless the conveyance shows a contrary intention either in express terms or by strong implication, the owner of minerals underlying the surface must mine them so as to leave reasonable support for the surface. LINDLEY, MINES, §§ 818, 819. But a conveyance of minerals carries with it by implication the right of way over and through the surface necessary to mine them. *Turner* v. *Reynolds*, 23 Pa. St. 199. As granite can be obtained only by means of an open quarry, and therefore without leaving any surface support, there is here a conflict of principles. However, in the present case some granite was exposed when the reservation was made, and consequently could be quarried. As a reservation will be construed most strongly against the grantor, it would not be unreasonable to subordinate the right of quarrying to the right of surface support. *Harris* v. *Ryding*, 5 M. & W. 60. Moreover, a right of way of necessity is implied only when there is no other way. LEAKE, LAW OF USES AND PROFITS OF LAND 268. This right is to be exercised with due regard to the surface owner. *Chartiers Coal Co.* v. *Mellon*, 152 Pa. St. 286. The decision seems correct; but it is an interesting matter for speculation as to whether it should be followed where none of the stone is exposed.

SALES — RIGHTS AND REMEDIES OF BUYERS — EFFECT OF ACCEPTANCE ON RIGHT TO SUE FOR DEFECTIVE PERFORMANCE. — The Kentucky Court of Appeals has recently stood evenly divided on the question, whether, in an action by a seller for the price of machinery, acceptance by the buyer waives his right to damages for failure to deliver at the time required by the contract. *Lucile Min. Co.* v. *Fairbanks, Morse & Co.*, 87 S. W. Rep. 1121. See NOTES, p. 208.

TAXATION — PARTICULAR FORMS OF TAXATION — INHERITANCE TAX: EQUITABLE CONVERSION OF FOREIGN REAL ESTATE. — A testator gave his executor power to sell his real estate situated in another state. At the time of his death his personal estate was insufficient to pay his debts and pecuniary legacies. *Held*, that the foreign real estate is equitably converted, and thereby

becomes liable as personalty to a collateral inheritance tax of the state where the testator was domiciled. *In re Vanuxem's Estate*, 61 Atl. Rep. 876 (Pa.). See NOTES, p. 201.

TAXATION — WHERE PROPERTY MAY BE TAXED — PERSONALTY AT DOMICILE OF OWNER. — Under a statute authorizing the taxation of "all personal estate of corporations organized under the laws of Kentucky whether the property be in or out of this State," a domestic corporation was taxed on cars which were used exclusively outside the state. *Held*, that the tax is unconstitutional, since it is depriving a person of property without due process of law. *Union, etc., Company* v. *Kentucky*, U. S. Sup. Ct., Nov. 13, 1905. See NOTES, p. 206.

TAX SALES — REDEMPTION — RIGHTS OF ORIGINAL OWNER AGAINST SUB-VENDEE. — A deed was given and recorded for land bought at a tax sale. Within the required period, the original owner redeemed, and received the tax deed from the purchaser, but did not get a quit-claim deed. After the period for redemption, the purchaser at the tax sale sold the property to the plaintiff who now claims title as a *bona fide* purchaser, since he had no actual notice of redemption. *Held*, that the plaintiff has no title, because sufficient notice of redemption is presumed from the fact that the purchaser at a tax sale has, by the law of the state, only an imperfect title until the period for redemption has expired. *Bennet* v. *Southern Pine Co.*, 51 S. E. Rep. 654 (Ga.).

The decision can be rested on more fundamental grounds than constructive notice. The first purchaser's title was defeasible on redemption, and redemption had been made. At that moment *ipso facto* the title re-vested in the original owner. *Burns* v. *Ledbetter*, 54 Tex. 374. Redemption itself, and not record of redemption, defeats the purchaser's title. *Cooper* v. *Shepardson*, 51 Cal. 298; *Fenton* v. *Way*, 40 Iowa 196. Even in states that require record of redemption, if an owner can prove redemption in fact, a tax deed issued later will give no title, though the purchaser did not know of the redemption on account of a clerk's failure to record it. *Burke* v. *Cutler*, 78 Iowa 299. In Georgia there is no provision requiring redemptions to be recorded. See Civ. Code, 1895, § 3618. Nor does the statute directing the purchaser to execute a quit-claim deed on redemption alter the case. Such statutes are to be construed liberally in favor of the parties entitled to redeem. *Burton* v. *Hintrager*, 18 Iowa 348. The Georgia statute provides that the quit-claim deed from the purchaser at the tax sale shall be *prima facie* evidence of redemption, not that redemption cannot be proved in other ways. If redemption is in fact proved, as here, then the purchaser, or anyone claiming under him, has lost his title absolutely, and that of the original owner must prevail.

TRUSTS — CREATION AND VALIDITY — TENTATIVE TRUSTS IN SAVINGS BANK DEPOSITS. — A spendthrift deposited his money in savings banks in the names of his sisters as trustees for his children, and delivered to the trustees the bank-books, intending thereby to save his money from being squandered, and to have it kept for the support of himself and his family during his life, and go to his children at his death. *Held*, that such deposits create "tentative" and not irrevocable trusts during the depositor's lifetime. *Lattan* v. *Van Ness*, 95 N. Y. Supp. 97. See NOTES, p. 207.

TRUSTS — POWERS AND OBLIGATIONS OF TRUSTEES — LIABILITY OF TRUSTEE FOR ACTS OF CO-TRUSTEE. — A trustee, with the consent of the *cestui* and the other trustee, sold a part of the *res*. Instead of reinvesting the proceeds, as was intended, he kept them; showing his co-trustee a forged receipt of the new stock which he purported to have bought. The *cestui* now brings action against the innocent trustee. *Held*, that this trustee was not negligent in dealing with his co-trustee and that he is, therefore, not liable for the defaults of that co-trustee. *Shepherd* v. *Harris*, L. R. [1905] 2 Ch. 310.

If, as in this case, there is no question of connivance or negligence, and if there is no special assumption of liability, then by a well settled rule of law, a trustee is not liable for the defaults of a co-trustee. *Townley* v. *Sherborne*,

3 White & Tudor Lead. Cas. Eq. 430. Nor is the trustee's liability increased by his dealing with his co-trustee as an agent. A trustee has power to appoint an agent to do certain ministerial acts, as, for example, to purchase specified stock; and one of the trustees may be appointed such an agent. *Purdy* v. *Lynch*, 145 N. Y. 462; see PERRY, TRUSTS § 404. In appointing and dealing with agents, a trustee need exercise only the same amount of care as a reasonable man of business would exercise in regard to similar affairs of his own. *Speight* v. *Gaunt*, 9 App. Cas. 1. The trustee here did exercise such reasonable care in dealing with his co-trustee as agent, and so is clearly not liable.

WITNESSES — PRIVILEGED COMMUNICATIONS — REPORT OF RAILWAY ACCIDENT. — The defendant company required from its servants a report of the particulars of every accident, partly with a view to possible litigation. *Held*, that documents containing such reports are not privileged. *Savage* v. *Canadian Pacific Ry. Co.*, 41 Can. L. J. 670 (Manitoba, K. B., June 15, 1905).

The doctrine of privileged communication between attorney and client is one of expediency, since the former must have as full information as possible in order to protect the interests of the latter. But this doctrine appears to have been extended very far in some cases of communications from or to third persons, which, clearly, should not be privileged unless such privilege is necessary for the protection of the relation between attorney and client. *Glyn* v. *Caulfeild*, 3 Mac. & G. 463. The mere fact that a party has, in view of litigation, obtained a report from a distant agent should not operate to give such party a privilege which one who has made a personal investigation under similar circumstances would not have. *Anderson* v. *Bank of British Columbia*, 2 Ch. D. 644. Such a report should on principle be privileged only when requested by the party's attorney, or for direct submission to him, with litigation definitely in view. *English* v. *Tottie*, 1 Q. B. D. 141. The privilege rightly discountenanced in the principal case would exempt practically all reports and accounts, being kept partly with a view to future possible litigation. It seems that as a rule no document made in the ordinary routine of business should be privileged. *Woolley* v. *North London Railway Co.*, L. R. 4 C. P. 602.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

THE PERSONALITY OF THE CORPORATION. — To decide cases on the authority of decisions that have gone before and the good, sound sense of the situation, without an over-nice inquiry into the fundamental theories of particular legal concepts is, perhaps, characteristic of Anglo-Saxon practical mindedness. Decisions are piled on decisions, phrases embodying slothful reasoning become threadbare by repetition, before the field is canvassed for a rational basis of the authorities or for a recognition of diverse conceptions expressed in conflicting authorities. That a definitely conceived theory may involve conclusions radically different from those obtained by a blind groping for results is probably nowhere more vitally true than in the law of corporations. The multiplication of questions presented and the extent to which corporations enter into the present social organization compel, for an intelligent dealing with the problems involved, too long neglected inquiries into the corporate idea.

Several theories of corporateness have been propounded, which will be found set forth in the highly suggestive Yorke Prize Essay of Mr. C. T. Carr, just issued by the Cambridge University Press. The investigation into the nature of the corporation is also pursued with great clearness and much vigor in the